

"I MAY NOT KNOW ART, BUT  
I KNOW WHAT I'LL PAY FOR": THE GOVERNMENT'S ROLE  
IN ARTS FUNDING FOLLOWING NATIONAL ENDOWMENT  
FOR THE ARTS V. FINLEY

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"Congress shall make no law . . . abridging the freedom of  
speech."<sup>1</sup>

"[F]irst [A]mendment doctrine is neither clear nor logical. It is  
a vast Sargasso Sea of drifting and entangled values, theories,  
rules, exceptions, predilections."<sup>2</sup>

I. INTRODUCTION: DOES THE GOVERNMENT BELONG  
IN THE ARTS BUSINESS?

At best, government funding of the arts creates an uneasy and precarious alliance. At worst, government involvement in the arts poses a danger of censorship so great that some are tempted to analogize Congress's imposing conditions on the National Endowment for the Arts' ("NEA") awarding of grants to Hitler's effect on developing art in Weimar Germany.<sup>3</sup> Supreme Court precedent which condones the government's right to place conditions on funding for the arts starkly contrasts with other precedents that unforgivingly condemn government regulations which disadvantage one viewpoint as compared to another. In choosing to establish a national presence in arts funding, Congress placed itself in a First Amendment no-man's land, pitting the right to condition a

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<sup>1</sup> U. S. CONST. amend. I (constitutionally protecting the freedom of speech).

<sup>2</sup> Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991) (describing the interpretive effort to develop a set of principles for evaluating regulations of racist speech).

<sup>3</sup> See Renee Linton, *The Artistic Voice: Is it in Danger of Being Silenced?*, 32 CAL W. L. REV. 195, 222-23 (1995) (describing Hitler's degradation and destruction of unconventional art in the 1930's).

grant as upheld in *Rust v. Sullivan*<sup>4</sup> against the duty not to disadvantage unpopular viewpoints as elucidated in *Rosenberger v. Rector and Visitors of University of Virginia*.<sup>5</sup>

Recently, public outcry over the funding of controversial art, which had begun to simmer in 1990, found its way to the Supreme Court in *National Endowment for the Arts v. Finley*.<sup>6</sup> In *Finley*, the Court upheld a 1990 amendment to legislation authorizing the NEA that dictated that decency must be "tak[en] into consideration" when awarding funds.<sup>7</sup> While the Court simply concluded that Congress's right to condition an award did not create an impermissible danger of suppression via viewpoint discrimination,<sup>8</sup> the decision may have practical repercussions for the integrity of artistic expression desperate to qualify for grant money. While the *de jure* versus *de facto* censorship debate will undoubtedly fill journal pages for some time into the future, the effect of the majority decision in *Finley* will be relegated to the position of mere speculation until legal historians can capitalize on years of hindsight.

The more pressing question which *Finley* brings to the fore, is whether a comfortable solution can be reached at the nexus of the arts, Congress, and the First Amendment. If First Amendment jurisprudence as explicated in *Rust* permits conditioning governmental awards, and if artistic expression cannot resist the temptation to conform to Congressional conditions on grant monies,<sup>9</sup> then perhaps *Finley* signals the need to examine the wisdom of federal involvement in funding the arts at all. Although held to be constitutional, the decency and respect provisions of the 1990 amendment to the National Endowment for the Arts enabling act do pose a danger of viewpoint discrimination. However, Congress's right to condition the grants trumped this concern, which was nebulous at best given the opaque language of the amendment.

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<sup>4</sup> 500 U.S. 173 (1990) (upholding regulations prohibiting grantees under Title X of the Public Health Service Act from counseling or advocating abortion as a method of family planning).

<sup>5</sup> 515 U.S. 819 (1995) (finding unconstitutional the terms and applications of guidelines used by the University of Virginia to withhold payment out of its Student Activities Fund for printing costs of a Christian student group).

<sup>6</sup> 524 U.S. 569 (1998) (upholding Congress's right to condition awards under the NEA based on "decency").

<sup>7</sup> *Id.* at 572. The amendment, part of the NEA's 1990 reauthorization bill, became 20 U.S.C. § 954(d)(1).

<sup>8</sup> *Id.* at 583. While the Court noted that section 954(d)(1) might potentially be applied in a manner suppressing unpopular viewpoints, it refrained from dealing with such a problem until it arose.

<sup>9</sup> See *id.* at 606 (Souter, J., dissenting) ("[T]he inextricability of indecency from expression, is beyond dispute in a certain amount of entirely lawful artistic enterprise. Starve the mode, starve the message.") (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 805 (1996)).

Because the Court distinguished between selectively funding art and regulating it,<sup>10</sup> the decency and respect provisions did not call down the full force of jurisprudential disdain for viewpoint discrimination in the First Amendment realm. As a result, the artistic and legal world must choose between a vague danger of discrimination or forsaking federal grant money. For those unable to accept any limits to the artistic voice, *Finley* signals the possible need to end government funding of the arts. While viscerally the thought of censoring an artist's personal expression is anathema, one cannot argue the position against censorship with the same moral force while simultaneously recognizing that these "oppressed" artists are voluntarily seeking a share in the government's coffers. When Congress proactively decides to enter the artistic realm, "censorship" as an outgrowth of the need to decide how to allocate limited funds must realistically be expected.

This Comment will examine the friction that is inherent in a situation where the government, the artist, and the First Amendment are the key players. The first section introduces the reader to the development of the National Endowment for the Arts, the recent problems surrounding indecent and obscene art, and the specifics that resulted in the present litigation. Part Two continues with a detailed discussion of the reasoning of the Supreme Court's (majority, concurring, and dissenting opinions) recent decision to enable the reader to gain a firm understanding of the minute points of law which dictated the outcome of the case. With this detail in mind, Part Three explores *Finley* in the context of *Rust* and *Rosenberger*, two recent Supreme Court decisions, one of which virtually predetermines the outcome of *Finley* and the other of which strongly counsels that *Finley*'s lone dissenter<sup>11</sup> contributed the most to the jurisprudential debate. In conclusion, Part Four considers the possible and probable effects of *Finley* on the arts and suggests possible alternatives to governmental participation therein.

### A. *The Historical Background of the NEA*

#### 1. *The Politics of Art in the Sixties*

In order to appreciate the full repercussions of *Finley*, one must be able to place both the decision and the history and

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<sup>10</sup> *Id.* at 588-90 (noting that a regulatory scheme with similar terms might invoke vagueness concerns).

<sup>11</sup> Justice Souter was the lone dissenter in *Finley*.

development of the National Endowment for the Arts in context. Responding to both the cultural upheaval of the 1960s and the general belief that the United States was lagging behind other countries which had already established systems for government-supported art programs, Congress created the National Foundation on the Arts and Humanities,<sup>12</sup> which served as the umbrella agency for the National Endowment for the Arts, in 1965.<sup>13</sup>

The NEA was originally created with the lofty ideals of supporting works of "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts."<sup>14</sup> To allay fears that Congress was laying the embryonic foundation for the creation of an Orwellian government art, the NEA emphasized "both the private sector's traditional role in promoting the arts and principles of artistic freedom."<sup>15</sup>

## 2. *The Explosion of Controversy*

For twenty-five years, the NEA enjoyed a relatively peaceful and litigation-free existence.<sup>16</sup> However, scandal and outrage erupted with the public displays of Robert Mapplethorpe's *The Perfect Moment* and Andres Serrano's *Piss Christ*.<sup>17</sup> The latter work consisted of a photograph of a plastic crucifix suspended in a jar of the artist's urine; the former was a collection of photographs, some of which depicted naked men engaging in homosexual activities.<sup>18</sup> Both of these works had

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<sup>12</sup> See Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U. L. REV. 353, 363 (1995) (recounting the establishment of the NEA).

<sup>13</sup> *Id.*

<sup>14</sup> 20 U.S.C. §§ 954(c)(1), 954(5) (1990). See also Jesse Helms, *Is It Art or Tax-Paid Obscenity? The NEA Controversy*, 2 J.L. & POL'Y 99, 101 (1994) ("The individuals responsible for the NEA's creation sought to establish an organization which would support projects with substantial artistic and cultural significance in order to encourage the development, appreciation and enjoyment of the arts.").

<sup>15</sup> Leff, *supra* note 12, at 364.

<sup>16</sup> *Id.* at 366-67. In 1984, leaders from the Italian-American community criticized a performance of Puccini's *Rigoletto* by the English National Opera at the Metropolitan Opera in New York, partially underwritten by an NEA touring program grant. Also, in 1985, controversy arose over an NEA-funded publication of allegedly pornographic poetry. Notwithstanding these isolated incidents, NEA grants had continued without creating much public stir. *Id.*

<sup>17</sup> See Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1103-04 (1995) (discussing the reaction of politicians, the public and the artistic community).

<sup>18</sup> *Id.*

received funding through the NEA.<sup>19</sup> Responding to the public outcry, Congress considered courses of action that included disabling the NEA entirely,<sup>20</sup> severely cutting its funding,<sup>21</sup> and creating standards and/or criteria for receiving monetary awards.<sup>22</sup>

### B. The 1989 and 1990 Amendments

The most vocal critic of the NEA was Senator Jesse Helms,<sup>23</sup> who likened the works of some NEA grantees to child pornography.<sup>24</sup> Angered by the fact that the NEA had dared to award grants to works of art which were so offensive to the "Judeo-Christian foundations of our nation,"<sup>25</sup> Helms proffered an amendment which would greatly limit the ability of the NEA to award grants on the basis of "artistic merit" alone. The 1989 proposed amendment provided:

None of the funds authorized to be appropriated pursuant to this Act may be used to promote, disseminate, or produce: (1) obscene or indecent materials, including but not limited to depictions of sadomasochism, homo-eroticism, the exploitation of children, or individuals engaged in sex acts; or (2) material which denigrates the objects or beliefs of the adherents of a particular religion or non-religion; or (3) material which denigrates, debases, or reviles a person, group, or class of citizens on the basis

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<sup>19</sup> The NEA awarded a total of \$45,000 to the two works. See Michael Wingfield Walker, *Artistic Freedom v. Censorship: The Aftermath of the NEA's New Funding Restrictions*, 71 WASH. U. L.Q. 937, 942 (1993).

<sup>20</sup> *Id.* at 942-43 (noting that Representative Dana Rohrabacher proposed abolishing the NEA entirely).

<sup>21</sup> *Id.* (pointing out that Representative Charles Stenholm proposed cutting the NEA's budget by \$45,000, the exact amount of the Mapplethorpe and Serrano awards).

<sup>22</sup> *Id.* (noting that Senator Jesse Helms proposed a ban on "obscene or indecent materials").

<sup>23</sup> Senator Helms offered several proposed amendments to the NEA grant-making process and argued that the citizens of the United States did not support Serrano's or Mapplethorpe's art. See Bollinger, *supra* note 17, at 1104 ("Senator Jesse Helms waged a legislative campaign to restrict the grant-making powers of the NEA."); see also Helms, *supra* note 14, at 99:

America is in the midst of a cultural war. On one side are those of us who want to keep our nation rooted in Judeo-Christian morality. On the other, are those who would discard this traditional morality in favor of a radical moral relativism. It is nothing less than a struggle for the soul of our nation. How this controversy is resolved will determine whether America will succeed and prosper, or be left in the dustbin of history.

*Id.*

<sup>24</sup> See Helms, *supra* note 14, at 100 ("The NEA gave tax dollars to support this publication claiming such photographs have 'artistic merit', despite the fact that Congress had previously enacted legislation to prevent such sexual exploitation of children. . . .").

<sup>25</sup> See *id.* at 101.

of race, creed, sex, handicap, age or national origin.<sup>26</sup>

Congress eventually enacted a much weaker version of Helms' original amendment. That 1989 amendment prohibited the NEA from using federal funds for the promotion or production of art that, in the judgment of the NEA "may be considered obscene, including depictions of sadomasochism, homo-eroticism, the sexual exploitation of children or individuals engaged in sex acts. . . ."<sup>27</sup>

The result of the 1989 amendment was the addition of an "obscenity pledge"<sup>28</sup> to the application for NEA funds. Essentially, artists applying for NEA grant monies signed a form, which promised that the work the artist was to create would not be obscene.<sup>29</sup> Greatly angered by this development, the art community first responded with protests<sup>30</sup> and finally litigation.<sup>31</sup> The obscenity oath was struck down as violative of the First Amendment freedom of expression, as well as being unconstitutionally vague, because no definition of "obscene" had been provided by the statute.<sup>32</sup> Congress responded to this decision with a second 1990 amendment. In addition to stating that "obscenity" was to be measured by the test set forth in *Miller v. California*,<sup>33</sup> the 1990 amendment added section 954(d)(1), which has come to be known as the "decency clause."<sup>34</sup> Section 954(d)(1) requires that "artistic excellence and artistic merit are the criteria by which grant applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the

<sup>26</sup> Helms, *supra* note 14, at 103 (citing 135 CONG. REC. S8807 (daily ed. July 26, 1989) (statement of Sen. Helms)).

<sup>27</sup> *Id.* (quoting Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101-121, § 340, 103 Stat. 741 (1990)).

<sup>28</sup> See Walker, *supra* note 19, at 944.

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 945, (citing Michael Himmelman, *Leonard Bernstein Refuses the Medal of Arts*, N.Y. TIMES, Nov. 16, 1989, at C26).

<sup>31</sup> See *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991) (invalidating the obscenity oath provision as unconstitutional for vagueness in violation of the Fifth Amendment).

<sup>32</sup> See *id.* ("There must be a statute specifically defining the sexual conduct the depiction or description of which is forbidden."); see also Walker, *supra* note 19, at 946 ("The deciding factor was that the pledge left the definition of obscenity completely under the NEA's control.").

<sup>33</sup> 413 U.S. 15, 24 (1972). In *Miller*, the Court announced a tripartite test to be used in determining whether a work would be considered obscene:

(a) whether the "average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

<sup>34</sup> Walker, *supra* note 19, at 950-51.

American public. . . .<sup>35</sup>

### C. Background of *Finley v. National Endowment for the Arts*

Karen Finley, John Fleck, Holly Hughes, and Tim Miller initiated the *Finley* litigation in California as a challenge to the NEA's denial of grant money.<sup>36</sup> The First Amendment challenge to the decency clause as violative of the right to freedom of expression and the Fifth Amendment challenge for overbreadth and vagueness were added after the initial commencement of the suit.<sup>37</sup> Both the District Court for the Central District of California and the Ninth Circuit Court of Appeals found that section 954(d)(1) was unconstitutional.<sup>38</sup>

## II. THE SUPREME COURT REVERSAL: THE DECENCY STANDARD IS CONSTITUTIONAL

### A. Justice O'Connor's Majority Opinion

#### 1. Viewpoint discrimination

While both lower courts found the Decency Clause to be violative of the artists' constitutional rights in freedom of expression and had given little weight to the government's ability to condition a grant,<sup>39</sup> the Supreme Court upheld the clause as constitutional, because it did not serve as an absolute bar,<sup>40</sup> and because the government could rightfully place conditions on a grant of public money.<sup>41</sup> To fully appreciate the import of *Finley*, one must understand the linchpins of the Court's reasoning. To that end, a detailed explanation is set forth below.

In what has been criticized as a technicality-based decision,<sup>42</sup> the *Finley* Court held that 20 U.S.C. § 954 (d)(1) was

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<sup>35</sup> See 20 U.S.C. § 954 (d)(1) (1993).

<sup>36</sup> *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1460 (C.D. Cal. 1992) [hereinafter *Finley I*].

<sup>37</sup> *Finley v. National Endowment for the Arts*, 524 U.S. 569, 577-78 (1998) [hereinafter *Finley III*].

<sup>38</sup> See *Finley I*, 795 F. Supp. 1457, 1476 ("The court grants the plaintiff's motion . . . on the grounds that the 'decency' clause . . . is void for vagueness under the Fifth Amendment and is overbroad under the First Amendment."); *Finley v. National Endowment for the Arts*, 100 F.3d 671, 683-84 (9th Cir. 1996) ("The 'decency and respect' provision of § 954(d)(1) is void . . . under the Fifth [and First Amendments].") [hereinafter *Finley II*].

<sup>39</sup> *Finley II*, 100 F.3d at 681-83; *Finley I*, 795 F. Supp. at 1463-64.

<sup>40</sup> See *Finley III*, 524 U.S. at 581 ("It is clear, however, that the text of § 954 imposes no categorical requirement.").

<sup>41</sup> See *id.* at 585.

<sup>42</sup> See *American Civil Liberties Union Freedom Network Release June 25, 1998*

not facially invalid as impermissible viewpoint discrimination nor was it void for vagueness under the First Amendment.<sup>43</sup> Relying on a close reading of the statutory text, Justice O'Connor concluded that the much criticized decency clause was a consideration, but not a necessary condition to be met before the National Endowment for the Arts could award grant money.<sup>44</sup> Comparing 20 U.S.C. § 954(d)(1) to § 954(d)(2), Justice O'Connor explained that Congress had created a categorical prohibition in the case of obscene art (section 954(d)(2)), and that it could just as easily have created an absolute decency requirement or indecency bar.<sup>45</sup> As written, section 954(d)(1) only requires that the NEA consider decency, not make its ultimate decision based on it.

In addition to analyzing the specific language of section 954(d)(1), Justice O'Connor considered the political atmosphere in which the amendment was passed.<sup>46</sup> The decency clause resulted from a bipartisan proposal introduced as a counter-offer to amendments aimed at eliminating the NEA's funding entirely or substantially constraining its grant-making authority. Therefore, the Court concluded that the clear lack of unconstitutional intent precluded striking the amendment itself as unconstitutional.<sup>47</sup>

Distinguishing the holding in *Finley* from prior case law which had found governmental regulations containing criteria that discriminated on the basis of viewpoint to be facially invalid, O'Connor indicated that the statute at bar posed no substantial danger of the suppression of free expression.<sup>48</sup>

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(Jan. 15, 1999) <<http://www.aclu.org/news/n062598b.html>>.

Although the Supreme Court upheld the "decency and respect" criteria imposed by Congress on the National Endowment for the Arts [NEA] in 1990, it did so only by rendering the law to be essentially meaningless. . . . Justices Scalia, Thomas, and Souter read the law to have the teeth that the ACLU believes Congress in fact intended. . . .

*Id.* See also Gene Gaudette, Opinion, PHILA. INQUIRER, June 29, 1998 (Jan. 15, 1999) <<http://www.csulb.edu/~jvancamp/intro.html>> ("The case was decided on technical grounds and on a narrow interpretation of the First Amendment.").

<sup>43</sup> *Finley III*, 524 U.S. at 573.

<sup>44</sup> See *id.* at 581 ("It is clear . . . that the text of § 954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech.").

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* "Furthermore, like the plain language of §954(d), the political context surrounding the adoption of the 'decency and respect' clause is inconsistent with respondents' assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria." *Id.* This sojourn into congressional motives was not without its critics. See *id.* at 594 (Scalia, J., concurring) ("The 'political context . . . ' which the Court discusses at some length . . . does not change its meaning or affect its constitutionality.").

<sup>48</sup> See *id.* at 585. Justice O'Connor distinguishes the possible consequences of



Arguably, the case did not involve a governmental regulation. Indecent artistic expression was not explicitly condemned, forbidden, or regulated by section 954(d)(1). Indeed, artists would continue to enjoy complete freedom to be as offensive as they wished; however, they could not expect tax dollars to underwrite their indecent expressions.<sup>49</sup> When patronizing the arts, the government played a fundamentally different role than that which it played as sovereign. As a sovereign, the government regulates, whereas in the role of patron the government supports or elects not to support the arts. Acting as a patron of the arts, Congress was free to condition the grant of money on any criteria it chose.<sup>50</sup>

Though the lower courts had balked at the opportunity for discrimination and censorship that the decency clause provided, the Court skirted the issue by employing a narrow statutory construction that hinged on the understanding of decency as a consideration rather than a criterion.<sup>51</sup> The majority decision has implicitly approved the notion that Congress may determine that art which deserves public money, i.e. "good art," should be decent, respectable art.<sup>52</sup> While the decision comports with some strong precedent,<sup>52</sup> the latent danger of Congress's ability to direct or entice artistic expression into acceptable channels illustrates that Congress cannot frictionlessly allocate public funds to the arts. Just as with its finding regarding viewpoint discrimination, the majority resoundingly supported the decency clause in the artists' vagueness challenge.

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the decency clause at issue in 954(d)(1) with previous legislation that had been invalidated by the Court. Specifically, O'Connor distinguishes *RAV v. City of St. Paul*, 505 U.S. 377 (1992), where legislation had been struck down as facially invalid. The municipal ordinance at issue in *RAV* had made certain type of unpopular speech subject to criminal penalty, thereby creating a grave danger of censorship by threat of imprisonment. No similar penalty was threatened by section 954(d)(1).

<sup>49</sup> See Helms, *supra* note 14, at 104, declaring that:

[Section 954(d)(1)] does not outlaw or ban such art. Because the legislation did not prevent artists from producing, creating, selling, or displaying so-called blasphemous or obscene 'art' at their own expense, or at the expense of other private sponsors, and on their own time, the legislation has in no way 'censored' any artists.

(emphasis in original).

<sup>50</sup> See *Finley III*, 524 U.S. at 585 ("Any content-based considerations that many be taken into account in the grant-making process are a consequence of the nature of arts funding.").

<sup>51</sup> This rather cramped reading of the statute, while not incorrect, did ignore the very outrage which prompted the amendment. Arguably, the interpretation, while sound legally, was blind to the realities of the history of the amendment.

<sup>52</sup> See analysis of *Finley III* in light of *Rust*, Part Three, *infra*.

## 2. Vagueness

While lower courts had been troubled by the vagueness of conditioning grants on a criterion as nebulous as "decency," the Court did not believe that the statute's vagueness posed a constitutional problem. The Court admitted that the decency provision was not specific, but found the clause's imprecision did not rise to the level of constitutional severity.<sup>53</sup> In the Court's view, decency and respect were terms no more vague than "artistic excellence."<sup>54</sup> Additionally, there are constitutional applications for the decency and respect prongs of the enabling statute. One job of the NEA is education; decency is a permissible factor where "educational suitability" is a consideration.<sup>55</sup> When the government is acting as patron and not as sovereign, the consequences of imprecision are not constitutionally severe.

Justice O'Connor further reasoned that if this statute were vague, then so would be all statutes that create federal scholarships for "excellence."<sup>56</sup> Invalidating section 954(d)(1) would fundamentally challenge the constitutionality of any federal grant or funding program that placed conditions on the receipt of funds.<sup>57</sup> Such a broadly sweeping decision would take First Amendment jurisprudence into unprecedented realms.<sup>58</sup> Within the realm of federal funding programs, government funding of the arts in particular is especially prone to the vagaries of subjectivity.<sup>59</sup> The *Finley* majority stated that artistic merit cannot be objectively quantified.<sup>60</sup> In order for the federal government to fund the arts, citizens must accept a significant amount of subjectivity.<sup>61</sup>

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<sup>53</sup> See *Finley III*, 524 U.S. at 588, noting that:

[t]he terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature.

<sup>54</sup> *Id.* at 584.

<sup>55</sup> See *id.* (citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (invalidating a Board decision to remove certain books from a school library on ideological grounds)).

<sup>56</sup> See *Finley III*, 524 U.S. at 589.

<sup>57</sup> See *id.* ("To accept respondents' vagueness argument would be to call into question the constitutionality of these valuable government programs and countless others like them.").

<sup>58</sup> Justice Scalia found the First Amendment inapplicable to funding situations entirely. See *id.* at 599.

<sup>59</sup> See *id.* at 588 ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991))).

<sup>60</sup> See *id.* at 589 (noting that subjectivity pervades government-granted merit aid).

<sup>61</sup> See *id.*; *supra* note 57 and accompanying text.

The funding process is subjectively selective; section 954 merely adds some imprecise considerations, and does not facially infringe the First Amendment.<sup>62</sup> O'Connor explained that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose 'artistically excellent' projects."<sup>63</sup> Similarly, she stated that "[t]he agency may decide to fund particular projects for a wide variety of reasons. . . . The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply 'inconceivable.'"<sup>64</sup> In the Court's view, section 954(d)(1) simply takes an "already subjective selection process" and adds an "imprecise" consideration.<sup>65</sup>

The artists challenging the decency clause in *Finley* had placed themselves in a challenging procedural position by waging a full frontal assault on section 954(d)(1).<sup>66</sup> Given the nature of facial invalidity in general and the overbreadth doctrine as it applies in First Amendment cases,<sup>67</sup> the Court concluded that until section 954 is applied in such a way as to drive certain ideas or viewpoints from the marketplace of ideas, its constitutionality will be upheld. Thus the artists simply failed to carry their burden.<sup>68</sup>

### 3. Congressional Spending and the Power to Condition Grants

Because the decency clause of the NEA's enabling statute does not infringe on a constitutionally protected right, Congress enjoys wide latitude in its spending power.<sup>69</sup> The Court

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<sup>62</sup> See *id.* at 588 (discussing the slight limits that might result due to the vagueness of section 954).

<sup>63</sup> *Id.* at 585.

<sup>64</sup> *Id.* at 585-86 (citing *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795-96 (1st Cir. 1976), *cert. denied*, 429 U.S. 894 (1976)).

<sup>65</sup> See *Finley III*, 524 U.S. at 585.

<sup>66</sup> See *id.* at 580 ("Respondents raise a facial constitutional challenge to § 954(d)(1), and consequently they confront 'a heavy burden' in advancing their claim." (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

<sup>67</sup> See *Finley III*, 524 U.S. at 580 ("To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

<sup>68</sup> See *Finley III*, 524 U.S. at 587 ("Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision.").

<sup>69</sup> See *id.* at 588 ("Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" (quoting

noted that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."<sup>70</sup> Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."<sup>71</sup> There is no viewpoint discrimination where Congress chooses to *fund* one activity to the exclusion of another. By minimizing the viewpoint and vagueness attacks and deferring to Congress' power of the purse, the Court emasculated the artists' claims, predetermining section 954(d)(1)'s validity.

### *B. Scalia's Concurrence: A Hard Look At Practical Realities*

#### *1. Practical Repercussions: The Majority Opinion* *"[S]ustains . . . [the Statute] [B]y [G]utting [I]t."<sup>72</sup>*

While the majority opinion dismisses the argument that section 954(d)(1) created viewpoint discrimination, Justice Scalia, possessed of common-sense and a cynic's real world outlook, admitted that the "decency" provision imposes a *de facto* condition upon NEA grant awards, regardless of the technical import of the "taking into consideration" language. Grammatical parsing<sup>73</sup> and bipartisan politics aside<sup>74</sup>, the clear intent of the decency language is that indecent art not receive federal grant money.<sup>75</sup> The statute does establish

*Rust*, 500 U.S. at 193)).

<sup>70</sup> *Firley III*, 524 U.S. at 587-88.

<sup>71</sup> *Id.* at 588 (quoting *Rust*, 500 U.S. at 193).

<sup>72</sup> *Firley III*, 524 U.S. at 590 (Scalia, J., concurring).

<sup>73</sup> See *id.* at 591.

The phrase "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is what my grammar-school teacher would have condemned as a dangling modifier: There is no noun to which the participle is attached . . . [E]ven so, it is clear enough that the phrase is meant to apply to those who do the judging . . . when evaluating artistic excellence and merit.

*Id.*

<sup>74</sup> Justice Scalia questioned (mocked) the majority's investigation into the motives of Congress, which are traditionally considered to be irrelevant in constitutional lines of inquiry. See *id.* at 595.

It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, "The more we get together, the happier we'll be." It is "not consonant with our scheme of government for a court to inquire into the motives of legislators."

*Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)).

<sup>75</sup> See *Firley III*, 524 U.S. at 592.

To the extent a particular applicant exhibits disrespect for the diverse beliefs and values of the American public or fails to comport with general standards of

content and viewpoint-based criteria, but they are "perfectly constitutional."<sup>76</sup> The statute makes it clear that decency and respect are factors to be taken into consideration when deciding whether to award a grant to an artist. These factors need not be dispositive, but they must be considered.<sup>77</sup> While the majority was able to give a legally viable reading to the decency clause, which focused on considerations, Justice Scalia argued that this reading was hollow and divorced from the practical realities of the situation.

## 2. Censorship By Viewpoint Discrimination

The First Amendment prohibits abridging<sup>78</sup> the freedom of speech.<sup>79</sup> According to Justice Scalia, nothing in the decency clause prevents avant-garde artists from being as indecent and unwholesome as they like. Such artists are perfectly free to be offensive; they simply cannot expect the government to pay for their efforts.<sup>80</sup> For Justice Scalia, failing to reward a particular behavior was not necessarily equivalent to punishing it.<sup>81</sup> Denying money to indecent art does not carry with

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decency, the likelihood that he will receive a grant diminishes. . . .

The applicant who displays "decency," that is, "[c]onformity to prevailing standards of propriety or modesty," and the applicant who displays "respect," that is, "deferential regard," for the diverse beliefs and values of the American people, will *always* have an edge over an applicant who displays the opposite. *Id.* at 592-93 (first emphasis added) (citations omitted).

Scalia also considered the political context in which section 954(d)(1) was adopted, but only in so far as the amendment was a direct reaction to public outcry over NEA funding of Serrano's *Piss Christ* and Mapplethorpe's *The Perfect Moment*. *See id.* at 594. Given the factors that lead to the adoption of section 954(d)(1) in the first place, it would strain credulity to think that Congress did not intend for the decency clause to limit funding that might otherwise be available to such controversial works. Clearly, section 954(d)(1) was intended to make funding indecent art more difficult than funding decent art, i.e. it was meant to discriminate. *See id.*

<sup>76</sup> *Id.* at 590.

<sup>77</sup> It is also worth noting that Scalia did not follow the mutual-exclusivity reasoning of the majority where vagueness necessarily defeats the view-point discrimination challenge:

[T]he conclusion of viewpoint discrimination is not affected by the fact that what constitutes "decency" or "the diverse beliefs and values of the American people" is difficult to pin down . . . any more than a civil-service preference in favor of those who display "Republican-party values" would be rendered non-discriminatory by the fact that there is plenty of room for argument as to what Republican-party values might be.

*Id.* at 593 (citation omitted).

<sup>78</sup> *See id.* at 595 (Scalia, J., concurring). Justice Scalia considers the literal meaning of "abridge" as defined in T. Sheridan's Complete Dictionary of the English language: "to contract, to diminish, to deprive of." *Id.*

<sup>79</sup> *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . .").

<sup>80</sup> *See* *Finley III*, 524 U.S. at 595-96.

<sup>81</sup> *See id.*

it the danger of suppression of certain ideas or a coercive effect.<sup>82</sup>

### 3. *The Nature of the Beast: Award Programs Are Discriminatory*

Scalia pointed out that because the NEA simply cannot award money to every artist who wants funding, it must reward some applicants and reject others.<sup>83</sup> Deciding how to divide a sum certain among a virtually infinite number of applicants mandates some sort of ranking system; that is the nature of funding organizations.<sup>84</sup> As Scalia pithily noted, "[i]t is the very business of government to favor and disfavor some points of view."<sup>85</sup> For Justice Scalia, the existence of a National Endowment for the Arts, which has a non-infinite budget, predestines some amount of viewpoint discrimination. Any criterion will be discriminatory to some extent.<sup>86</sup>

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<sup>82</sup> See *id.* at 596.

Censorship, as I understand it, is the attempt—almost always unjustified—to use the power of the state to silence expression—for example, by jailing artists or burning books, practices that we associate with totalitarian societies. But a withdrawal of public financial support (tax dollars) strikes me as quite a different thing—objectionable perhaps, but not in the same league with most cases of genuine censorship. . . . Even if people have a right to desecrate the flag, it does not follow that they have a right that somebody else be forced to pay the bill to provide them with an arena in which to do it. To suggest otherwise is, I think, logically confused and morally dangerous—morally dangerous because it cheapens the currency of moral discourse when a strong condemnatory word such as 'censorship' is used casually.

*Id.* (quoting Jeffrie G. Murphy, *Freedom of Expression and the Arts*, 29 ARIZ. ST. L.J. 549, 550 (1997)).

<sup>83</sup> See *Finley III*, 524 U.S. at 596 (arguing that a denial of funding to certain points of view is not coercive).

<sup>84</sup> See *id.*

<sup>85</sup> *Id.* at 598. Justice Scalia went even further to suggest that "the NEA itself is nothing less than an institutionalized discrimination against [certain] point[s] of view." *Id.* at 597.

<sup>86</sup> While never explicitly discussed by the Court or Justice Scalia, it is important to realize that "decency" discriminates against subject matter that conflicts with decent expression. For example, unlike Republicanism, or atheism, or vegetarianism, which ostensibly embrace identifiable world outlooks, decency is an umbrella term encompassing a mode of expression. Theoretically, it is possible to express anything decently or indecently. Consider the following: "Republicanism" in and of itself, is arguably not indecent. However, were one to create a work of art depicting famous, political conservatives in a crass or lewd manner, that expression could be indecent. As a mode of expression, decency will discriminate against those viewpoints which are strongly correlated with and customarily expressed in an indecent way. A correlation between certain ideas and indecent expression is an unspoken assumption in the decency-discrimination debate.

### C. Souter's Dissent

#### 1. Viewpoint Discrimination

Essentially, Souter's dissent was predicated on two simple conclusions: the decency clause mandates viewpoint discrimination and the First Amendment declares viewpoint discrimination in the exercise of public authority over expression to be unconstitutional.<sup>87</sup> Souter argued that because the First Amendment has been interpreted to require viewpoint neutrality,<sup>88</sup> the government may not prohibit the expression of an idea nor discriminate in granting "government favors"<sup>89</sup> simply because society finds that idea offensive or oppressive. Therefore, he continued, Congress cannot prohibit protected speech based on whether or not it is offensive.<sup>90</sup>

The dissent claimed that First Amendment jurisprudence shows that Congress is not allowed to use decency as a standard for regulating speech.<sup>91</sup> Souter argued that "indecentcy" is an inherently viewpoint-based criterion.<sup>92</sup> The idea of indecentcy is inseparable from the ideas and expression conveyed by the art; thus, by regulating the decency requirement, Congress regulates expression. While Souter conceded that the government's purpose is not the controlling consideration in a First Amendment case, he noted the purpose here was clearly to withhold money from offensive art.<sup>93</sup>

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<sup>87</sup> See *Finley*, 524 U.S. at 600-01, noting that:

The decency and respect proviso mandates viewpoint-based decisions in the disbursement of government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional.

<sup>88</sup> See *id.* at 601 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989))).

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* ("Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses.").

<sup>91</sup> See *id.* at 615 n.9 (noting that the government may use neutral criteria such as artistic merit in awarding grants, but not viewpoint-based criteria (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995))).

<sup>92</sup> See *id.*

<sup>93</sup> Like Justice Scalia, Justice Souter recognizes that section 954(d)(1) was clearly intended by its drafters and proponents to have a discriminatory effect on the funding of indecent art. See *id.* at 608. It was not meant to be a consideration, but rather a criterion. See *id.* While Justice Scalia dismisses the discriminatory effect in the face of a constitutional condition on a congressional grant, see *id.* at 595-96, Justice Souter condemns the decency clause as an impermissible attempt by the federal government to suppress unpopular ideas, which cannot be accomplished even where Congress is signing the check and paying for the art. See *id.* at 604 n.2.

## 2. *Government Patronage and Conditioned Spending*

Justice Souter believed that even though the government had voluntarily entered a realm not recognized as one of its traditional responsibilities, having thus assumed the task, it was bound to fund the activity in a non-discriminatory manner.<sup>94</sup> Souter echoed recent case law when he stated, "this is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."<sup>95</sup> Congress simply may not discriminate invidiously in its subsidies in such a way as to suppress ideas. In his dissent, Justice Souter discussed the hypocrisy or willful blindness of the Court's technical interpretation of section 954(d)(1) as a consideration, indicating that the Court would have no trouble concluding that other "considerations" would clearly be constitutionally suspect:

But even if I found the Court's view of "consideration" plausible, that would make no difference at all on the question of constitutionality. What if the statute required a panel to apply criteria "taking into consideration the centrality of Christianity to the American cultural experience," or "taking into consideration whether the artist is a communist," or "taking into consideration the political message conveyed by the art," or even "taking into consideration the superiority of the white race?" Would the Court hold these considerations facially constitutional, merely because the statute had no requirement to give them any particular, much less controlling, weight? I assume not.<sup>96</sup>

## 3. *The Implicit Danger of Indirect Censorship*

In addition to the immediate cash value of an NEA grant, Justice Souter reminded the Court that the grant also acts as a "stamp of approval"<sup>97</sup> for works of art. Following receipt of an NEA grant, an artist can often expect to receive additional funds from private sources who respect the NEA award enough to follow suit.<sup>98</sup> When Congress enacted the decency

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<sup>94</sup> See *id.* at 604 n.2 (noting that the First Amendment "speaks up only when Congress decides to participate in the Nation's artistic life by legal regulation, as it does through a subsidy scheme like the NEA ... [such that] if Congress does choose to spend public funds in this manner, it may not discriminate by viewpoint in deciding who gets the money").

<sup>95</sup> *Id.* at 612 (quoting *Rust v. Sullivan*, 500 U.S. 173, 199 (1991)).

<sup>96</sup> *Finley III*, 524 U.S. at 610.

<sup>97</sup> Walker, *supra* note 19, at 941.

<sup>98</sup> See *Finley III*, 524 U.S. at 622 (citing *Bella Lewitzky Dance Found. v.*



clause, it in effect stifled much of the support for indecent art with the intent and probable result being the eventual demise of such expression.<sup>99</sup>

Like Justice Scalia, Justice Souter was willing and eager to state the arguably obvious repercussions of throwing hurdles in front of those who would seek funding for their indecent artistic sensibilities; namely, less money for indecent art, and thereby, less indecent art. One could argue that the chief differences between the reasoning of the majority and the dissent lay in the philosophical disagreement over any duty of impartiality Congress had once it has directly undertaken an activity for promoting cultural consciousness. When one approaches the situation believing that Congress can condition its grants, the decency criterion is simply a unique brand of qualification which attaches to artistic rather than academic excellence and merit. On the other hand, where one approaches the situation from a strict free-speech perspective, the decency clause is seen as a tool for invidiously discriminating against a particular point of view and its expression; arguably, using legislation to quash art which some senators and representatives find distasteful moves dangerously close to censorship.

To further appreciate the tensions inherent in *Finley*, one must examine it in light of two prior cases, *Rust* and *Rosenberger*, chiefly cited by the majority and dissent respectively. Taken together with the analysis in *Finley*, the three cases illustrate the thorny conundrum that one encounters when trying to parse out the "correct" or "just" response to a constitutional attack on the decency clause. Additionally, by examining the issues and inconsistencies raised by comparing these cases, one cannot help but conclude that the realm of artistic expression is a domain best left to private funding sources, who need only please their own subjective tastes and sensibilities when writing a donation check. The government simply cannot formulate a principled system of rewarding artistic works, because any standard will (1) be inherently subjective; (2) offend some section of the tax-paying populace; (3) discriminate against some works of art; and (4) reasonably be interpreted as either constitutional or unconstitutional, de-

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Frohnmayr, 754 F. Supp. 774, 783 (S.D. Cal. 1991)).

<sup>99</sup> Despite Justice Souter's discussion of the possible implications that the Decency Clause will have in private support for arts funding, these effects, while unfortunate, do not necessarily change the underlying theory that the First Amendment does not entitle one to have the government pay the bill for one's freedom of speech. See Murphy, *supra* note 82, at 560 ("We all have a constitutional right that the state respect for each of us a wide range of expressive freedom but no comparable right that the state pay the bill for this freedom.").

pending on whether one approaches the problem with either Congress's tax and spend power or the First Amendment in mind.

Although the mere controversial nature of, or philosophical difficulty in, creating a principled answer to a challenging question is an insufficient reason to say that Congress should ignore or run from an issue, the costs of angling over issues of public arts funding can be divisive and time-consuming, and may indicate that it is simply time for Congress and the nation to move on to more pressing concerns. Recently, the NEA has found itself mired in expensive litigation over emotionally charged issues. If artists cannot accept that Congress may constitutionally condition the granting of NEA funds, then, it may be best for both artists and legislators to move in their separate directions.

### III. FINLEY IN LIGHT OF RUST AND ROSENBERGER

"Congress shall make no law . . . abridging the freedom of speech."<sup>100</sup> While this handful of words ostensibly imparts a simple idea to the reader, Supreme Court jurisprudence on the First Amendment clearly indicates that the right to "free speech" is not absolute.<sup>101</sup> Defamatory attacks,<sup>102</sup> fighting words,<sup>103</sup> and obscene expression<sup>104</sup> are the chief examples of types of speech that the government is able to regulate to some degree. Art<sup>105</sup> is recognized as a form of speech worthy

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<sup>100</sup> U.S. CONST. amend. I.

<sup>101</sup> See e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that defamatory speech is not unconditionally protected by the Constitution); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that fighting words are not constitutionally protected.).

<sup>102</sup> See *Sullivan*, 376 U.S. at 279-80 ("The constitutional guarantees require . . . a federal rule that prohibiting a public official from recovering damages for defamatory falsehood . . . unless he proves that the statement was made with 'actual malice' . . .").

<sup>103</sup> See *Chaplinsky*, 315 U.S. at 572 (holding that words designed to incite immediate unlawful behavior are not protected speech under the First Amendment).

<sup>104</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing the three criteria for determining whether speech is obscene and beyond the protection of the First Amendment).

<sup>105</sup> Arguably the definition of "art" itself is a vagary. Some propose that experts should determine what is art. See Beverly M. Wolff, *A Look at the NEA Restrictive Language and Whether Art by Definition Can be Obscene*, address before The Samuel Rubin Program for Liberty and Equality Through the Law: *Arts Funding and Censorship - The Helms Amendment and Beyond*, (Mar. 8, 1990), in 15 COLUM.-VLA J.L. & ARTS 23, 24, 28 (1990) ("[C]urators are empowered by us to make those determinations of what is art. A court would . . . be hard pressed to overrule a curatorial judgment."); but see Richard Epstein, *Constitutional Conundrums in the Public Funding of the Arts*, Address before the Samuel Rubin Program for Liberty and Equality Through the Law: *Arts Funding and Censorship - The Helms Amendment and Beyond*

of First Amendment protection;<sup>106</sup> however, it is not always recognized as a form of political speech<sup>107</sup> and as a result does not always automatically enjoy the highest level of protection.<sup>108</sup> For this reason, artistic expression, when challenged, must seek protection through First Amendment jurisprudential doctrines such as overbreadth.<sup>109</sup> As the majority opinion in *Finley* illustrates, this level of protection is not fail-safe.<sup>110</sup>

### A. Decency Clause Violates First Amendment as Vague and Viewpoint-Discriminatory

Unlike "obscenity," the definition of which has been delineated by the Supreme Court in *Miller v. California*,<sup>111</sup> the

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(Mar. 8, 1990), in 15 COLUM.-VLA J.L. & ARTS 23, 30, 37 (1990) ("I would much prefer systematically to take precious public resources and devote them to those issues that indisputably require a collective choice rather than frittering them away on what I regard to be essentially a second order problem: Is X a really great artist or just a fool who managed to graduate with an MFA?").

Additionally, at least one author has argued that the mere fact that art is created by a marginalized artist who typifies a minority political view is insufficient to catapult his or her expression into the realm of art. See Jeffrie G. Murphy, *supra* note 82, at 554 declaring that:

Mere victim status—status as a person marginalized . . . on grounds of gender, sexual orientation, mental illness, political alienation or whatever—cannot automatically qualify one's cries of pain and outrage as artistically significant expressions—not, at any rate, on any theory of art that would take art seriously.

<sup>106</sup> See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston Inc.*, 515 U.S. 557, 569 (1995) (noting that examples of painting, music, and poetry are "unquestionably shielded"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection. . . ."). But see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-29 (1971) (arguing that art is not political speech and is therefore not worthy of First Amendment protection).

<sup>107</sup> See, e.g., Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16 ("The people do not need novels or dramas or paintings or poems because they will be called upon to vote. Art and belles-lettres do not deal in such ideas (i.e. ideas relevant to the political process)—at least not good art or good belles-lettres. . . .") (parenthetical added).

<sup>108</sup> See generally, *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70 (1976) (Stevens, J.) (arguing that even though erotic materials may have some artistic value, society's First Amendment interest in them is wholly different from and less than its interest in untrammelled political debate).

<sup>109</sup> See *Finley III*, 524 U.S. at 583 (noting the overbreadth argument).

<sup>110</sup> See *id.* at 583 (rejecting the overbreadth argument).

<sup>111</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973) (outlining the three guidelines used to establish obscenity).

concept of decency is inherently subjective.<sup>112</sup> When interpreting "decency clauses" in various First Amendment contexts, the Court is often relegated to use of a standard English dictionary in the quest for an interpretation of the statute at issue.<sup>113</sup> Decency by definition is a function of community values, and these values will vary demographically. Decency, then, is inherently vague in that it cannot ostensibly be defined on a national level.<sup>114</sup> Ironically, it is decency's vagueness which argues most strongly against the viewpoint discrimination challenge.<sup>115</sup>

In cases where the Supreme Court has found statutes to discriminate impermissibly on the basis of viewpoint, the statute has, with relative clarity, put a particular ideology at a distinct disadvantage.<sup>116</sup> For example, the Court has struck down statutes and ordinances where the "Christian" viewpoint was disadvantaged in expressing itself on a topic, while the "atheist" viewpoint was not similarly muzzled.<sup>117</sup> While the government may be able to justify context discrimination

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<sup>112</sup> One could justifiably argue that the concept of "obscenity" was equally subjective, until such time as the Supreme Court saw fit to define it. However, the Court has had repeated opportunities to elucidate the legal community on the meaning of or criteria for "decency." Each time, regardless of whether the statute was ultimately invalidated or not (including the present case) the Court has declined the invitation. See generally *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act is violative of First Amendment); *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978) (affirming the FCC's power under 18 U.S.C. § 1464 (1976) to a write comment letter to a radio station to the effect that a George Carlin monologue, "Filthy Words," was indecent and should not have been aired when children were in the audience).

<sup>113</sup> See *Finley III*, 524 U.S. at 593 (Scalia, J., concurring) (quoting The American Heritage Dictionary's definition of "decency").

<sup>114</sup> But see Helms, *supra* note 14, at 99 (defining what he considers to be national decency, i.e. Judeo-Christian morality).

<sup>115</sup> See *Finley III*, 524 U.S. at 583. The irony is especially sharp since the majority in *Finley III* used respondents' own argument against them:

As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. Respondents assert, for example, that "one would be hard-pressed to find two people in the United States who could agree on what the 'diverse beliefs and values of the American public' are, much less on whether a particular work of art 'respects' them"; and they claim that "decency" is likely to mean something very different to a septuagenarian in Tuscaloosa and a teenager in Las Vegas. . . ." Accordingly, the provision does not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views.

*Id.*

<sup>116</sup> See, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (holding that a school district violated the First Amendment when it denied church access to school premises after school solely because church wanted to address a subject from religious viewpoint).

<sup>117</sup> See *id.* at 392-97 (asserting that denying church access to school premises violates the First Amendment).

on rare occasions where the prohibition is narrowly tailored to a valid government goal or interest, the Court generally finds viewpoint discrimination to embody the blatant suppression of one (disfavored) group's ideas.<sup>118</sup>

If "decency" is inherently vague or, if definable, conceivably disadvantages one group's ideas or preferred medium of expressing those ideas, what saves it from unconstitutionality? Justice O'Connor's majority opinion first sought solace in a cramped, technical interpretation of the statutory language, in that decency need only be "take[n] into consideration," rather than used as an absolute criterion.<sup>119</sup> Prior caselaw, especially the Supreme Court's holding in *Rosenberger*, weakens O'Connor's reasoning. Generally, the Court has been aggressive to the point of being categorical when protecting speech from conditions on its use.<sup>120</sup> With relatively few exceptions,<sup>121</sup> regulations and conditions which hint at the government's attempt to suppress unpopular or unpleasant thoughts and ideas are invalidated with little apology or explanation.<sup>122</sup>

Scalia's concurrence and Souter's dissent recognize the common-sense implications of the decency clause: it is a restriction on the funding of "indecent" art. Since prior caselaw strongly indicates, if not dictates, that the decency clause embodies content if not invidious viewpoint discrimination, upholding section 954(d)(1) primarily reflects the Court's beliefs about the government's spending powers, rather than any philosophical ideas about art and expression. At its foundation, *Finley* affirms *Rust* and gives Congress great discretion in spending tax revenue, even to the point of "regulating" what many recognize as a valuable expression of and a commentary on society's values: the voice of the artist.

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<sup>118</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (providing analysis for the determination that a school's regulation prohibiting the distribution of funds to a religious newspaper violated the First Amendment).

<sup>119</sup> *Finley III*, 524 U.S. at 582 (The statute "admonishes the NEA merely to take 'decency and respect' into consideration.").

<sup>120</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Lamb's Chapel*, 508 U.S. at 393-94; *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating a statute that differentiated between types of picketing allowable within 150 feet of a school).

<sup>121</sup> See *supra* note 99.

<sup>122</sup> See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (holding that the public display of expletive words are protected under the First Amendment absent a compelling state interest).

*B. Attaching Strings:  
Congress Has the Right to Condition an Award*

While the majority opinion simply concludes that if section 954(d)(1) is unconstitutional, so are innumerable government programs predicated on excellence, Scalia's concurrence expounded in far greater detail why the government's either vague or specifically discriminatory condition is constitutional. Essentially, the government can spend tax money as it sees fit. In fact, the *raison d'être* of democratic self-governance is that some viewpoints (those of the minority) will suffer slightly at the hands of the majority when the government is deciding how to handle its "largesse." Scalia's conclusion echoed prior Court holdings in *Rust* and *South Dakota v. Dole*.<sup>123</sup> The reasoning is simple and eloquent, but philosophical problems arise when one considers that Congress has affirmatively entered the artistic speech realm. The consequences of selectively rewarding decent art may have more troubling repercussions than limiting federally funded contraception programs to pre-conception methods, or requiring South Dakota to raise its drinking age to 21. The above examples of attaching strings to federal money arguably pose little or no danger to freedom of speech and expression. When Congress chooses, however, to place conditions on grants to artists, whose job is to hold a mirror to society through music, sculpture, or painting, those conditions pose a far greater risk of censorship. This danger is explored further below.<sup>124</sup>

*C. Viewpoint Discrimination and Conditions on a Grant:  
Rust & Rosenberger Collide*

Governmental attempts to regulate speech by content or viewpoint are judged with a strict scrutiny standard.<sup>125</sup> Generally, when the Court has been sympathetic to regulations, statutes, and ordinances that ostensibly limit speech based on viewpoint or content, the regulations at issue have been

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<sup>123</sup> 483 U.S. 203 (1987) (validating the receipt of government funds for highway maintenance conditioned on raising the minimum drinking age to 21 under the spending power of Congress).

<sup>124</sup> See *infra* Part C.

<sup>125</sup> See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 784-85 (1996) (Kennedy & Ginsburg, JJ., concurring in part, concurring in judgment, and dissenting in part) ("[S]trict scrutiny at least confines the balancing process in a manner protective of speech; it does not disable government from addressing serious problems, but does ensure that the solutions do not sacrifice speech to a greater extent than necessary.").

narrowly tailored and closely related to valid governmental objectives.<sup>126</sup> Those cases which invalidated the legislation or ordinance at issue have relied on a general premise that the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>127</sup> In such cases where the governmental attempt at regulating speech is declared unconstitutional, the Court generally relies on the expressive nature of the speech coupled with the tenet that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>128</sup>

Despite such strong sweeping sentiment which seduces the reader with its bright-line simplicity, the Court has been willing to turn a blind eye to obvious viewpoint discriminatory regulations where the government is paying for the service or expression. The most recent application of this approach is found in *Rust v. Sullivan*.<sup>129</sup> This case involved a facial challenge to Department of Health and Human Services ("HHS") regulations which limited the ability of Title X fund recipients to engage in abortion-related activities.<sup>130</sup> The regulations at issue attached three conditions to the grant of federal funds for Title X projects. First, the regulations specified that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral

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<sup>126</sup> See generally *id.* (ruling that provision permitting cable operator to prohibit patently offensive or indecent programming was consonant with appropriate government needs and objectives); see also *Rust v. Sullivan*, 500 U.S. 173 (1991) (asserting that regulations forbidding discussion of abortion in programs using Title X funds do not violate First Amendment right to free speech); *Leathers v. Medlock*, 499 U.S. 439 (1991) (holding that Arkansas' extension of generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (holding that an ordinance prohibiting posting signs on public property was not unconstitutional as applied to expressive activities of supporters of a political candidate); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (ruling that internal revenue statute which grants tax exemption for certain nonprofit organizations that do not engage in lobbying activities does not violate First Amendment); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that FCC review which condemned daytime broadcast of indecent George Carlin monologue not violative of First Amendment where there was reasonable concern that children would be in the listening audience at the time of the broadcast).

<sup>127</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (invalidating Texas statute which prohibited flag burning).

<sup>128</sup> *Id.* at 415 (citation omitted).

<sup>129</sup> 500 U.S. 173 (1991) (holding that regulations that prohibit Title X projects from engaging in activities advocating abortion are a permissible construction of the statute and consistent with the First and Fifth Amendments).

<sup>130</sup> See *id.* at 177-78.

for abortion as a method of family planning."<sup>131</sup> Second, the regulations broadly prohibit a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning."<sup>132</sup> Finally, the regulations require that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities.<sup>133</sup>

By mounting a facial challenge to the constitutionality of the statute, the petitioners in *Rust* faced a heavy burden: establishing that the Act would not be valid under any set of circumstances.<sup>134</sup> Since all discussion of abortion was essentially banned, petitioners contended that the regulations violated the First Amendment by impermissibly discriminating based on viewpoint.<sup>135</sup> The Court rejected this challenge holding that:

[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.<sup>136</sup>

Similar logic echoes in the majority's holding in *Finley*, where the Court upheld the government's prerogative in selectively funding species of artistic expression.<sup>137</sup> The Court's reasoning in *Rust* also relied heavily on distinguishing between statutes which regulated through rewards as opposed to penalties.<sup>138</sup> While the Court in *Rust* began its analysis

<sup>131</sup> *Id.* at 179 (citing 42 C.F.R. § 59.8(a)(1)(1989)).

<sup>132</sup> *Id.* at 180 (citing 42 C.F.R. § 59.10(a)(1989)).

<sup>133</sup> *Id.* at 180 (citing 42 C.F.R. § 59.9 (1989)).

<sup>134</sup> See *id.* at 183 ("[T]he challenger must establish that no set of circumstances exists under which the Act would be valid.").

<sup>135</sup> See *id.* at 192. Petitioners argued that the First Amendment was violated because they prohibited "counseling, referral, and the provision of neutral and accurate information about ending a pregnancy." *Id.* (citation omitted).

<sup>136</sup> *Id.* at 193.

<sup>137</sup> See *Finley v. National Endowment for the Arts*, 524 U.S. 569, 587 (1998).

<sup>138</sup> See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (citing *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* In general, the Court has been especially eager to invalidate statutes which penalize on the basis of viewpoint. See *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (citation omitted), which invalidated a St. Paul Bias-Motivated Crime ordinance which made plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to . . . a burning cross . . . , which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

See also *Dawson v. Delaware*, 503 U.S. 159 (1992) (reversing sentence in criminal case where jury had based sentencing decision on prisoner's membership in a racist gang); *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating the Flag Protec-



claiming that the government had not in fact discriminated on the basis of viewpoint, it later equivocated, explaining that "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect."<sup>139</sup> While the Court first seems to deny that the Government's conditions in Title X even constitute viewpoint discrimination, the latter passage seems to hint that the Court might have believed that the conditions did (at least in application) constitute some form of viewpoint discrimination; however, the Court recognized that invalidating the conditions on Title X would potentially endanger all Government programs which rewarded some qualities to the exclusion of others. Justice O'Connor's majority opinion in *Finley* is strongly reminiscent of this line of policy reasoning, validating section 954(d)(1) in part out of concern for the potential ripple effect on other Congressional award/grant programs.<sup>140</sup>

Like the provisions at issue in *Rust*, the decency clause found in section 954(d)(1) serves as both a limitation on the breadth and scope of the use of federal funds, and a selective rewarding to certain viewpoints. In *Rust*, "pro-choice" was a viewpoint which could not be sounded lest federal funds be lost; similarly, in *Finley*, that "viewpoint" which correlates significantly with indecency in a mode of artistic expression was put at a distinct disadvantage in the competition for federal funds, despite the "opaque" drafting of the statute. While aspects of *Rust* support both O'Connor's<sup>141</sup> and Scalia's<sup>142</sup>

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tion Act of 1989 which made flag burning a federal crime); *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating Texas statute which criminalized flag burning); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidated city ordinance which distinguished between non-labor and labor picketing, criminalizing the former and allowing the latter); *Cohen v. California*, 403 U.S. 15, 18 (1971) (invalidating statute where "[t]he only 'conduct' which the State sought to punish is the fact of communication" where accused was convicted under the statute for wearing jacket with "Fuck the Draft" written on it).

<sup>139</sup> *Rust*, 500 U.S. at 194.

<sup>140</sup> See *Finley III*, 524 U.S. at 589 ("Indeed, if this statute is unconstitutionally vague, then so too are all Government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'").

<sup>141</sup> In O'Connor's opinion, the ambiguous drafting of section 954(d)(1) is neither viewpoint-discriminatory, nor poses any danger of viewpoint discrimination. See *id.* at 588-90.

<sup>142</sup> Unlike Justice O'Connor, Justice Scalia recognizes that section 954(d)(1) was intended to be, and most likely would be in practice, a criterion for receiving NEA funds and would put indecently expressed art at a distinct disadvantage (if not act as an absolute bar). See generally Walker, *supra* note 19.

opinions in *Finley* regarding the finer distinctions on viewpoint discrimination, the sentiments in *Rust* clearly indicate that Congress enjoys wider latitude in regulating speech (through actions and behaviors) when Congress is not only listening, but paying as well.<sup>143</sup> Had *Finley* arisen in 1990, given the non-criminal nature of the effect of failing to comply with section 954(d)(1) and the fact that Congress was underwriting the National Endowment for the Arts, the holding would have been most unspectacular. The Court's 1995 decision in *Rosenberger*, however, added more tension to an already murky First Amendment jurisprudence.

*D. Rosenberger: Scarce Resources  
and Viewpoint Discrimination*

In the early 1990s, a student organization, Wide Awake Productions ("Wide Awake"), sued the University of Virginia for failing to use money from the Student Activity Fund ("SAF")<sup>144</sup> to pay for the costs of the organization's Christian publication.<sup>145</sup> The SAF received its money from a mandatory fee of \$14 per semester charged to each full-time student.<sup>146</sup> When Wide Awake petitioned the SAF to pay for the printing costs of its publication, the SAF refused, claiming that Wide Awake was a religious organization.<sup>147</sup> After appeals within

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<sup>143</sup> See *supra* note 136 and accompanying text.

<sup>144</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824-27 (1995):

Established and governed by University Guidelines, the purpose of the SAF is to support a broad range of extracurricular student activities that "are related to the educational purpose of the University. . . ." The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs. Some, but not all, [student groups] . . . may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment . . . because they "are related to the educational purpose of the University of Virginia." One of these is "student news, information, opinion, entertainment or academic communications media groups. . . ." [S]tudent activities that are excluded from SAF support are religious activities. . . . A "religious activity" . . . is defined as any activity that "primarily promotes or manifests a particular belief[] in or about a deity or an ultimate reality."

*Id.* (alteration in original and citations omitted). Wide Awake was created to publish a magazine for philosophical and religious expression, with tolerance to Christian viewpoints. *Id.* at 825-26.

<sup>145</sup> See *id.* at 822-23 (citation omitted):

The University of Virginia . . . authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes . . . a particular belief[] . . . in . . . a deity."

<sup>146</sup> See *id.* at 824.

<sup>147</sup> See *id.* at 827. SAF claimed that the newspaper manifested a particular belief

the university failed, Wide Awake filed suit in federal court, claiming that the refusal to grant funds constituted impermissible viewpoint discrimination.<sup>148</sup>

Ruling that the University of Virginia's refusal to fund Wide Awake Productions violated the First Amendment prohibition on viewpoint discrimination,<sup>149</sup> the Supreme Court asserted the basic First Amendment axiom that "the government may not regulate speech based on its substantive content or the message it conveys."<sup>150</sup> The principle that follows is that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another."<sup>151</sup> The Court explained that the University of Virginia's refusal had the effect of closing academic debate on religious topics, since atheists were free to voice their opinions, while the Christian viewpoint, as published by Wide Awake, would have been muzzled to the extent of its ability to pay its own printing costs without SAF aid.<sup>152</sup> That risk is analogous to the risk Justice Souter voiced in his dissent in *Finley*: under the amendment, indecent art would be financially disadvantaged when compared to decent art (at least for National Endowment dollars), while views expressed "decently" would have no such handicap.<sup>153</sup>

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about a deity or ultimate reality. *See id.*

<sup>148</sup> *See id.* (noting that Wide Awake alleged that SAF's refusal to provide funds based on religious editorial viewpoint violated their rights to freedom of speech).

<sup>149</sup> *See id.* at 837 ("[W]e hold that the regulation invoked to deny SAF support, both in its terms and in its application . . . is a denial of their right of free speech guaranteed by the First Amendment."); *see also id.* at 828:

By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial *viewpoints*. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

*Id.* (emphasis added).

<sup>150</sup> *Id.* at 828 (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

<sup>151</sup> *Id.* (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

<sup>152</sup> *See id.* at 836 ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."). While the majority opinion chiefly relies on the fact that the University policy discriminates based on viewpoints, *see supra* note 149, Justice Kennedy acknowledges that one could interpret the University guideline's "sweeping restrictions on student thought" as a blanket censorship mechanism, which, when carried to its logical extreme, could be read to prohibit all speech with a religious content, whether spoken by an atheist or the devoutly religious. Such content-based discrimination would be equally repugnant to First Amendment values. *See id.* at 836-37.

<sup>153</sup> *See* *National Endowment for the Arts v. Finley*, 524 U.S. 569, 621-22 (1998) (explaining that the makers of controversial art will either "trim their work" of offen-

Initially, one may be tempted to distinguish *Rosenberger* from *Rust* by suggesting that, where all projects cannot be funded, the government enjoys far greater discretion in its ability to discriminate in spending its tax dollars. The Court's sweeping language in *Rosenberger*, however, weakens the validity of this distinction; "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. . . . It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle."<sup>154</sup> Suddenly, O'Connor's reasoning in *Finley*, which rested at least partially on the fact that the NEA has a finite budget, loses force. It would appear that the fact that the NEA lacks the resources to allocate funds to every applicant for funds, does not allow the budgeting criteria to be unfair or prejudiced against an unpopular viewpoint.

In its own discussion of *Rust*, the *Rosenberger* Court explained that the government:

did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.<sup>155</sup>

Thus it appears that to save the decency clause from unconstitutionality, one must only find that the government is taking legitimate steps to ensure that its message is not garbled. Here, analogizing to *Rust*, the message is the desirability of "decent" art. If the government can constitutionally determine that decency may be a consideration in the public funding of art, and that notion creates a visceral emotional reprobation in the American public, the NEA may cause more strife than good. Perhaps the majority's holding in *Finley* signals that it is time for the government to try to find another means of supporting the arts.

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sive content or refrain from seeking NEA funding altogether).

<sup>154</sup> *Rosenberger*, 515 U.S. at 835.

<sup>155</sup> *Id.* at 833 (citing *Rust v. Sullivan*, 500 U.S. 173, 194, 196-200 (1990) (citations omitted)).

*E. The Nature of Arts Funding  
and Role of the Government:  
The Patron/Sovereign Distinction*

One final distinction relied upon by the Court in *Finley* is the patron/sovereign dichotomy. This approach is the very semantic incarnation of the two ways of viewing the decency clause (taxation and spending versus freedom of expression) which are essentially outcome determinative frameworks for viewing the entire issue.

Unlike the University of Virginia in *Rosenberger*, Congress is not seeking to reimburse individuals for the cost of expression. Whereas in *Rosenberger*, the University was paying printing costs directly to third-party contractors who had printed *Wide Awake's* news publication,<sup>156</sup> Congress (through the NEA) is not reimbursing individual artists. Congress has used tax dollars to create and support a *National Endowment for the Arts*. Like the program created by Title X,<sup>157</sup> the NEA is an entity that owes its existence to Congressional enabling legislation.<sup>158</sup> Congress has the ability to use private speakers (e.g. artists) to promote a particular policy of its own.<sup>159</sup>

As in *Rust* when it discriminated against abortion, Congress in *Finley* had the ability, having brought the NEA into being and possessing the power to annihilate it as well, to selectively fund some types of art to the exclusion of others. That the art community does not approve of Congress's taste in art is a function of happenstance. Had a more liberal Congress decided that indecent art was more worthy of funding, *Finley* might never have darkened the doorstep of a courthouse. As Justice Scalia aptly pointed out, the nature of government is to make choices to implement the will of the majority,<sup>160</sup> even where that majority—speaking through its elected representatives—chooses to support some viewpoints

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<sup>156</sup> See *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring) ("[F]unds are paid directly to the third party vendor and do not pass through the organization's coffers.").

<sup>157</sup> See *Rust*, 500 U.S. at 178-79 (describing Title X which provides federal funding for family planning services).

<sup>158</sup> There is no constitutional duty to provide for the arts. Congress voluntarily entered the art world in 1965 by creating the NEA by legislation. See *Leff*, *supra* note 12, at 363-64.

<sup>159</sup> See *Rust*, 500 U.S. at 192-96. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 193.

<sup>160</sup> See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (arguing that congressional funding of expressive activities advances "[the people's] favored point of view").

but not others. While the First Amendment can easily protect those whose rights are threatened by regulation through criminal penalties, its driving force is weakened in the face of "regulation" through congressional funding. Artists who receive NEA grants are chosen by the specific criteria pertaining to the program.<sup>161</sup> In seeking the funding, artists recognize and accept a limited amount of self-censorship. Aware of the criteria for receiving funding, artists who seek and realistically expect to receive such grants are not so naive that they do not realize the costs. Those artists who prefer to remain indecent in their subject matter or expression need only find a private patron with similar artistic predilections.

Congress is not required by the First Amendment to subsidize a citizen's fundamental right to free expression.<sup>162</sup> Having *chosen* to enter the realm of arts funding, has Congress changed the balance of power to such a degree that the arts now depend upon the NEA? Presumably not, given the NEA's relatively brief history and limited budget.<sup>163</sup> Artists angered by the conditions and considerations Congress has attached to the NEA grant process may choose among several remedies. They may use the legislative process to elect a Congress more likely to replace the decency provision in section 954(d)(1) with an indecency provision, which, according to the reasoning in *Rust* and *Finley*, would be just as constitutional. Conversely, they may compromise their artistic voice in the struggle for limited NEA dollars, that is, they may prostitute themselves; or, they may retain the integrity of their mode and medium, seeking patronage from private sponsors.

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<sup>161</sup> See *id.* at 587-88 (holding that Congress "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake").

<sup>162</sup> See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1983) (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (holding that Congress is not required to subsidize expression through lobbying)).

<sup>163</sup> See Epstein, *supra* note 105, at 35.

Even though private funding of the arts may not be adequate within the art community . . . still when corporate and private giving are available, you still have enough alternative sources of money, so you really cannot say that unless you have public money, all art, all commerce, and all creativity will cease. *Id.*; but see Beverly Wolff, *supra* note 105, at 29:

Unfortunately, there is no legal obligation for the federal government to fund the arts—there is no fundamental right to this subsidy. However, I find the argument that we would all be . . . better off without the NEA to be very problematic. . . . [T]his seriously ignores the role that the NEA has played over the last 25 years in the arts community. . . . There are so many people, so many emerging artists, so many arts programs that wouldn't exist without the NEA, and I think that it's very specious to assume that the corporate world could fill this gap or that private funders could.

## IV. CONCLUSION

A. *The Constitutional Threat of Censorship and the Arts*

There is ample support for both the constitutionality and the unconstitutionality of decency as a condition on federal grant money.<sup>164</sup> The nexus of the debate is whether the viewer sees the question as primarily one of discretionary congressional spending, or as one of censoring artists' freedom of expression. The majority in *Finley* chose to ignore a decency requirement's probable effects on certain artistic viewpoints (i.e. no federal money) and instead found section 954(d)(1) constitutional on narrow, technical grounds. As Justices Scalia and Souter were quick to observe, however, the danger of censorship cannot reasonably be overlooked as the likely practical consequence.

Given the ostensible danger of direct or self-censorship which could result from conditions on federal grants and the necessity of having some rational means of allocating finite resources, the decency provision is a worrisome, albeit perfectly constitutional, piece of legislation. If *Finley* signals the Court's willingness to allow Congress wide reign over the national purse strings, the NEA, in its current form, will occupy an odd position in the art world. Originally founded to foster the arts in America, the NEA can now conceivably be used as a tool for favoritism, depending on the composition of Congress and the NEA review board.

B. *The Federal Government's Future in Arts Funding*

The effects of *Finley* will not be fully known for some time. While William J. Ivey, Chairman of the National Endowment for the Arts felt that the Court's decision in *Finley* would finally allow the NEA to return to business as usual,<sup>165</sup> only history will be able to accurately gauge the full effects of the Court's recent decision. If the art world becomes dissatisfied with an organization that dictates the favored mode of artistic

<sup>164</sup> See e.g., Epstein, *supra* note 105, at 34-36 (summarizing the First Amendment arguments made for and against the constitutionality of decency restrictions on arts funding, and concluding that both sides' arguments are compelling).

<sup>165</sup> "Today's decision is an endorsement of the Endowment's mission to nurture the excellence, vitality and diversity of the arts and a reaffirmation of the agency's discretion in funding the highest quality art in America. We anticipate that the Court's ruling will not affect our day-to-day operations." See *Statement by William J. Ivey, Chairman of the National Endowment for the Arts in Response to the Supreme Court Decision in Finley v. NEA* (Jan. 15, 1999) <<http://arts.endow.gov/endownews/news98/Statement6-25.html>>.

expression, then the NEA may be short-lived. The danger of censorship can be overcome by simply taking the federal government out of the arts business. If *Finley* indicates that the NEA may be doomed to act as a mere function of the vacillating political views of Congress, then perhaps it is time to revise the practice and implementation of public arts funding.

Since artistic taste is inherently subjective, reasonable alternatives to the current NEA include a return to strictly private arts funding, a reliance on the current federal income tax deduction for charitable contributions<sup>166</sup> in lieu of the NEA, or a tax credit that would be slightly more generous than the current deduction. By placing primary responsibility for arts funding in the hands of individuals, the censorship danger will disappear. Artists would be free to create as they wish and appeal to their particular audience for support. Artists would not need to conform to any grant conditions as under the current NEA scheme. Unless and until artists accept strings on federal money, the NEA will be susceptible to censorship attacks. If these complaints fall on deaf Supreme Court ears, the best way to battle the danger of censorship will be to circumvent the NEA rather than attempt a full frontal attack. As *Finley* illustrates, for now, the latter strategy will not work.<sup>167</sup>

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<sup>166</sup> See Epstein, *supra* note 105, at 36-37 (outlining his solution to the federal grant conundrum: a grant-matching program whereby the government would contribute 28% of an artist's total grant with no conditions attached, provided that the artist could first raise the remaining 72% from private sources).

<sup>167</sup> See *id.* at 37 ("So I shall leave with the following conclusion. If conditional subsidies for art are unconstitutional, and if total subsidies for art are unconstitutional, then my own preferred position—no public money for art—may just be the source of constitutional wisdom after all.").